In The

Supreme Court of the United States

October Term, 1975

No. 75-1236

THOMAS ZAMMAS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above styled case on January 9, 1976.

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit, is reported at ——F.2d—— and is printed at Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on January 9, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Is it a violation of a defendant's due process rights, for a trial court to make highly inflammatory and prejudicial comments during closing arguments, which served to inform the jury of the court's belief in the defendant's guilt?

2. Is it a violation of a defendant's due process rights for a trial court to instruct a jury so improperly as to virtually direct a verdict of guilty against the defendant?

3. Is it a violation of a defendant's due process rights where a motion for judgment of acquittal at the end of all the evidence is denied, where the Government totally failed to prove its case as set forth in the indictment?

STATEMENT OF THE FACTS

After the preliminary proceedings were concluded, Stanley Perlmutter commenced his testimony. Perlmutter was a

registered representative at Continental Securities in the year 1972. Mr. Perlmutter had met the defendant, Zammas, while working at Executive Securities in the year 1971. His first contact with the defendant, Rodman, was in the spring of 1972.

During the spring of 1972, Perlmutter had a conversation with Zammas concerning the stock of Power Conversion, Inc. According to Perlmutter, Zammas said, "We have a very good situation here in Power Conversion and do you think Eric Aiken would do a write up?" Perlmutter told Zammas that because of the background surrounding the Aiken-Zammas relationship, he doubted Eric "Would touch it at all. . . ." Zammas indicated that it would be worth his while. Perlmutter agreed to mention this to Aiken.

According to Perlmutter, Aiken's immediate reaction was, I don't want to have anything to do with it." "I don't want to have anything to do with Tom Zammas again." This initial reaction of Aiken was based upon a problem they (Aiken and Zammas) had in the past. During August of 1972, favorable articles concerning Power Conversion appeared in several publications. Perlmutter then had a second conversation with Aiken wherein he asked Aiken that they could earn some money if an article was written. Aiken agreed to look into the stock. According to Perlmutter, someone at Value Line already had a file on the Power Conversion stock issue.

Aiken called a day or so after the second conversation and asked for a meeting with Zammas. A meeting was held in late August or early September in an Italian restaurant on the east side of Manhattan.

After a discussion about some prior dealings where Aiken did not get paid, Zammas indicated he would guarantee payment in this situation. As a part of the guarantee, 1,000 shares of Power Conversion stock would be given to Aiken as collateral. Fifteen thousand dollars in cash was to be paid upon the writing of the article. There was also to be "some type of play on the profits on the 1,000 shares of collateral stock."

Aiken agreed to proceed when he had possession of the shares of stock. It was at this time that Perlmutter left the restaurant. Perlmutter testified that he later received from Aiken $3,500 in cash and a forgiveness of a $4,000 debt. This was paid about one week after the article was published.

On cross-examination, Perlmutter was asked about several dealings he had on stocks other than those mentioned in his agreement with the Government. Perlmutter, in most instances, invoked his Fifth Amendment privilege and declined to answer questions.

When questioned about the initial meeting with Zammas, Perlmutter recalled that it occurred in April, May or early June of 1972. After Aiken's original rejection of the article, Perlmutter approached him again, in August of 1972. Zammas did not solicit this second effort of Perlmutter. Perlmutter then approached Zammas, after the second meeting with Aiken, and, at that time, indicated Aiken's willingness to do the article.

Perlmutter admitted that Aiken told him he, "Could never guarantee any article would be published." Everything had to meet with the approval of his boss.

William Aiken was the executive editor of Value Line Selection and Opinion, a publication of Arnold Bernhard and Co., Inc. in the year 1972. Prior to his testifying, Aiken had pled guilty to one count of fraud in connection with the case against the defendant, Zammas, and, had further entered into an agreement with the Government concerning his other criminal involvements. This agreement was entered into evidence and read into the record.

Aiken then testified that he knew and had engaged in business dealings with Stanley Perlmutter. In September of 1972 Perlmutter came to him with a proposition regarding a company called Power Conversion. Perlmutter told him that Zammas wanted a write-up on Power Conversion. Aiken refused the deal at that time.

This refusal was predicated upon a prior involvement with the defendant, Zammas, in a transaction concerning the stock of Casa Bella Imports, Inc. Counsel for Zammas objected to the introduction of testimony relating to Casa Bella. Further, he moved that the answer of the witness concerning Casa Bella be stricken from the record. It was defense counsel's position that the Casa Bella situation was not a prior similar act. The Government argued that it was. The court allowed the testimony to be admitted as a prior similar act.

Aiken testified that he finally agreed to go to a meeting with the defendant. He then described the Casa Bella situation which had occurred in 1970.

Aiken met with Zammas and Perlmutter in September, 1972, at the La Fortuna Restaurant. At that meeting, Zammas

offered him fifteen thousand dollars in cash and an override on 20,000 shares of Power Conversion stock. According to the witness, he requested guarantees and was told he would be given 1,000 shares of the stock of the company to hold as security for the payment.

The transfer of shares and payment of $1,000 was to take place that evening. Accordingly, Aiken accompanied Zammas to an apartment on 35th and Lexington Avenue where the transfers took place.

Aiken prepared an article on Power Conversion and submitted it for publication. One day prior to the *official* publication, Aiken advised Zammas that the article was coming out and arranged a meeting for that night. At approximately 11:30 p.m. the witness, his fiance, the defendant and his girlfriend met at the Ground Floor Cafe, where the witness testified monies and copies of the article were exchanged in the men's room. Over objection Aiken was allowed to testify that the article written by him was favorable.

Aiken recalled another meeting with the defendant, Zammas, several months after the article. According to Aiken, the defendant stated at that meeting that, "Well, I got wiped out, I had a lot of puts I had to walk away from. The SEC is after me, but you don't have to worry because I can't do anything, you know, — I can't do anything to you without bearing to myself."

On cross-examination, Aiken testified to his agreement with the Government. He admitted lying to the Government when he

first agreed to testify in 1973. He further admitted committing perjury before the SEC in a Philadelphia hearing.

Aiken admitted that he never received money from the defendant, Zammas on the Casa Bella deal. Aiken recalled the first meeting with Stanley Perlmutter concerning Power Conversion taking place in September, 1972.

In response to questioning, Aiken admitted that he could not guarantee the publishing of an article in Value Line. Further, he could not guarantee publication of an article to the defendant on the night of their first meeting. Aiken could never guarantee the publication of an article since Arnold Bernhard himself had the final authority as to all articles to be published. Bernhard was the publisher of Selection and Opinion.

In conclusion, Aiken admitted that the defendant, Zammas, had no idea an article was being published until *after* the actual publication of the magazine.

Pericles Constantino had formerly been President of Provident Securities, a brokerage house, before being barred from the Securities Industry for violations of federal securities' laws. Constantino was able to identify the defendant, Rodman, as a market maker in Power Conversion. Rodman and he had a meeting during the summer of 1972 relating to a stock known as Fantastic Fudge. During this meeting, Constantino asked the defendant, Rodman, how he had managed to keep the selling price of Power Conversion stable. Rodman informed Constantino that it had cost him to have an article published in Value Line.

On cross-examination, Constantino recalled the conversation taking place a month or two prior to the publication of the article itself.

Constantino admitted perjuring himself in an SEC investigation that related to Fantastic Fudge. Constantino was testifying in order to comply with an agreement wherein he promised to cooperate with the Government. Constantino did not know the defendant Zammas.

Susan Aiken, the wife of Eric Aiken, recalled the September meeting. She and Mr. Aiken went to the Ground Floor Restaurant to meet Zammas. Her husband had informed her that he was there to pick up a sum of money. The defendant Zammas and Stephanie Palumbo arrived after the Aikens. Mr. Aiken gave Zammas an envelope with Power Conversion articles contained therein. When the Aikens departed the restaurant, Eric Aiken had fourteen thousand dollars in cash in his coat pocket. During cross-examination, Mrs. Aiken admitted signing a false affidavit.

Robert Wymbs met the defendant, Zammas in the office of Henry Goldfarb. Wymbs was introduced to Rodman by Zammas in the offices of C.I. Oren. Wymbs visited the office of C.I. Oren almost daily during the period of August and September, 1972.

It was during this period that Wymbs bought and sold the stock of Power Conversion, Inc. Wymbs was informed by Zammas that Power was an expanding and growing company which would be a good investment. Rodman also indicated to Wymbs that the stock in Power was on its way up.

Early in September of 1972, Wymbs overheard a phone conversation wherein the defendant, Rodman was asking an unidentified person as to when the article would be finished for publication. Thomas Zammas and Irving Orenstein were present while Rodman was on the telephone.

Another conversation took place approximately one week later in an apartment in Manhattan. Present were Rodman and his girlfriend, Denise Gennaro. A third conversation occurred several days later between Rodman, Zammas and Denise Gennaro. It was during this third conversation that Rodman produced an envelope with approximately five thousand dollars in cash. Wymbs stated that this money was produced after it was ascertained that the article in question was ready to be published. The money was to be given to someone at Value Line to publish the article.

On cross-examination, Wymbs testified that he first heard about an article coming out in Value Line late in August, 1972. Wymbs was aware of a five thousand dollar payoff to someone at Value Line to get the article published.

Irving Orenstein, President of C.I. Oren and Co., was introduced to the public offering of Power Conversion by Thomas Zammas. Orenstein's company took in 20,000 shares of Power Conversion and distributed same to its customers. Some of these shares were bought back by C.I. Orenat the direction of Thomas Zammas. Orenstein was told there was going to be a write-up in Value Line by either Zammas or Rodman. He wasn't sure which of the defendants informed him of the article.

Alan Umbogy met with Rodman and Zammas on September 27, 1972 at Wolf's Coffee Shop. It was at this time that Rodman showed Umbogy a copy of the article in Value Line that Zammas had allegedly just finished arranging for. According to Umbogy, the article was to hit the street that day.

Umbogy took a copy of the article he was given to his home. This was subsequently delivered to the U.S. Attorney's Office and was entered into evidence.

During the third week of September, 1972, Rodman asked Umbogy, during a telephone conversation, to purchase some shares of Power because an article was scheduled to be published in Value Line. This phone conversation took place on the day prior to Umbogy being given the article he previously testified to.

After being shown a copy of the Value Line article, Umbogy could no longer be sure that his meeting with Rodman and Zammas took place on the 27th. The copy of the article given to Umbogy was a xerox copy of the article that was to hit the street on the day of the meeting. None of the parties were making a secret about the article coming out. Umbogy was never told that the article had been paid for.

Leonard Flocco of the National City Bank testified that on or about September 18, 1972, Thomas Zammas had a conversation with him at the bank. The conversation related to a secured loan. It was during this conversation that Mr. Zammas apparently indicated an article would be written concerning the Power Conversion stock. The memoranda prepared by Flocco were introduced into evidence.

Stephanie Palumbo was with the defendant, Zammas, when he met with Eric Aiken and his fiance. The meeting took place at the Ground Floor restaurant. At dinner the two men left the table and were apparently gone for some period of time. Miss Palumbo had no idea why she had gone to the meeting at the restaurant.

At the conclusion of Miss Palumbo's testimony, the Government rested its case. Defense counsel moved for a directed verdict of acquittal at the close of the case. This motion was denied by the trial court.

Edward J. Crooker, was employed by Value Line Selection and Opinion as the comptroller in September of 1972. Exhibit L was the list of officers and directors of Arnold Bernhard and Co. Inc. during 1972. Crooker identified the defendant's Exhibit I as an issue of Selection and Opinion dated October 16, 1970. On the back of this issue was a good faith disclaimer. This was the same good faith disclaimer that Value Line consistantly published throughout 1972.

Crooker testified that if Aiken had reported the beneficial interest in the stock of Power Conversion to Arnold Bernhard and Co.'s legal counsel, pursuant to the good faith disclaimer, it would not have been disclosed to the public.

At the conclusion of this witness' testimony, the defense rested. A motion for judgment of acquittal was tendered to the trial court. After a lengthy argument, the court denied the motion.

During the closing argument defense counsel argued that the payment in question was not a violation of federal law if disclosure had been made. The payment itself, according to defense counsel, was perfectly legal under federal law provided there was disclosure. The U.S. Attorney objected to this legal argument. It was at this point that the court, in the presence of the jury stated as follows:

> "Yes, we went over that earlier and it was determined that under State law, if the Jury finds it to be true, it is not a legal act. The question is whether or not you are implying to the Jury that giving a payment under the circumstances here is legal.
>
> You said it was legal and we determined it was illegal under State law to give such a payment. The Federal law makes it illegal to give such a payment if it is not disclosed. So don't mislead the Jury by telling them it is a legal act if they find it did occur."

This comment by the court led to a motion for mistrial. The motion was made after defense counsel concluded his closing argument. The court denied said motion.

The U.S. Attorney in his final remarks to the jury indicated that the defendant, Zammas had done business with Aiken on other occasions. Mr. Lowe stated that the Casa Bella article, which had been brought up during the testimony, did not contain a disclosure. Defense counsel objected to this line of argument since the Casa Bella article had not been put into

evidence. Defense counsel further pointed out that there was no evidence before the jury which would indicate that disclosure had not been made. A motion to strike was tendered in behalf of the defendant. The court denied the defendant's motions. Further the court indicated that the jury could find from the evidence that there had been no disclosure in the Casa Bella article.

After all counsel had completed their closing arguments, another motion for mistrial was advanced to the trial court. Apparently Mr. Rodman's attorney, Mr. Berger, had information that Denise Gennaro had told the U.S. Attorney that Mr. Wymbs' testimony concerning her presence at a meeting was untrue. Miss Gennaro had told Mr. Lowe that she was not in the apartment in question during July, August or September of 1972. Mr. Berger indicated that Gennaro had advised him of this fact. The U.S. Attorney's office indicated that Mr. Berger's statements were essentially correct. The Government's position was, that since Mr. Berger was aware of Gennaro's testimony, the Government had no obligation to disclose same. The Assistant U.S. Attorney had assumed that Mr. Berger would relate this information to Mr. Zammas' counsel. Berger admitted that he had not disclosed this information to any of Zammas' attorneys. The court withheld ruling on the *Brady* question and adjourned the case until the following morning.

The following morning the court instructed the jury as to the applicable law. Over objection, the trial court indicated that it would instruct the jury that the "Casa Bella" testimony could be considered as a prior similar act. This instruction was given by the trial court. Further, instructions relating to the substantive crime were objected to by the defendant.

After the jury retired, the court heard argument concerning the claimed *Brady* objection. It was during this argument that counsel for the defendant, Rodman, admitted that he never informed counsel for the defendant Zammas, of his knowledge concerning Ms. Gennaro's testimony. The court heard lengthy argument wherein the Government conceded the fact that it had an agreement to supply *Brady* material to the defense. After extensive argument, the court ruled that the Government had no obligation to supply *Brady* material relating to Denise Gennaro.

A motion for mistrial relating to the Casa Bella argument was denied by the trial court.

After a lengthy deliberation, the jury found the defendant guilty on all counts of the indictment. This appeal follows.

REASONS FOR GRANTING WRIT

I.

The trial court erred in making prejudicial comments during the closing argument which effectively denied the defendant Zammas his right to a fair trial.

It is essential to our entire system of justice that, while no defendant is entitled to a perfect trial, every defendant is entitled to a fair trial. In order to insure the fair and proper administration of justice, the court must not, under any circumstances, either direct a verdict of guilty or tend to influence the jury in making its determination. During closing argument counsel for the defendant Zammas, conceded the fact

that a sum of money had been paid for the publication of the Value Line article in question. Although this concession was for the purpose of the argument, it was the position of the defense counsel that the mere payment of money for the publication of an article was not a violation of Section 77q(b) of the Security Laws. During the motions for judgment of acquittal at the close of all the evidence, defense counsel had argued that the payment itself was not illegal.[1] The basis for the defendant's position on this point may be found elsewhere in this brief on the section dealing with sufficiency of evidence. Briefly, however, the statute itself recognizes that payment may be made to financial magazines for the publication of articles concerning securities provided that disclosure of these payments be made in the article. Thus, the payments are made illegal under federal law only in such instances where there is nondisclosure of the payment in the article itself; caused by the defendant. This was what counsel for defendant Zammas was attempting to argue to the jury at the time the court made the prejudicial comment complained of hereunder.

Upon objection by the Government, the following colloquy took place:

> THE COURT: Yes, we went over that earlier and it was determined that under State Law, if a Jury finds it to be true, it is not a legal act. The question is whether or not you are implying to the Jury that giving a payment under

1. It was at this time that the court first expressed a position the payment was illegal as a violation of state law. For this reason, the argument during the closing very carefully referred only to the fact that disclosure in the article would have made the payment legal insofar as the Federal Criminal Statutes were concerned.

> the circumstances here is legal. You said it was legal and we determined it was illegal under State law to give such a payment if it is not disclosed. Don't mislead the Jury by telling them it is a legal act if they find it did occur.
>
> MR. ENTIN: I think I indicated it was legal under Federal law, your Honor.
>
> THE COURT: No, we had a discussion earlier which said that the statement should not be made to the jury, which you have made."

This statement was made in the presence of the jury.[2]

The colloquy cited above indicated that the court had had a discussion earlier with counsel regarding the alleged statement not to be made to the jury. A careful reading of the record reflects that counsel followed diligently the court's direction, which was to specifically indicate his argument applied to federal law and not to state law.

Later, during the Government's rebuttal, the Assistant United States Attorney, as further proof that nondisclosure was intended by the defendant, stated that there had been no disclosure in an article written by the defendant Aiken upon a

2. Interestingly enough, there was nothing in the record to establish that a change had been filed under the New York Commercial Bribery Statute. In fact, no such charge was ever filed against the defendant Zammas. Further, pursuant to the proof adduced at this trial, there would have been insufficient evidence to establish a violation of this statute. See Article 180, Section 180 and *June Fabrics v. Teri Sue Fashions*, N.Y.S. 2d 877 (1948).

company known as Casa Bella Imports. The Casa Bella Imports article was alleged to have been a prior similar transaction. When the defense argued, stating that there had been no testimony of nondisclosure in the Casa Bella article, and, that the article itself was never placed into evidence by the Government, the court stated before the jury as follows:

> "THE COURT: I told the Jury it is their recollection of the facts which control. The motion to strike is unnecessary. If they remember it differently, they remember it differently. I don't remember precisely what Mr. Aiken said, but it is the Jury's recollection that controls; and they might even infer that from all of his other testimony or the testimony relating to this, if they so desire, *that was also an illegal proposition.*
>
> There is evidence from which they could, if they believed the testimony of Aiken infer that was so in that case, so it is unnecessary to strike it. Proceed."

It is submitted on behalf of the defendant that the above comments were highly prejudicial and denied him a right to a fair trial. Defendant Zammas does not disagree with the general proposition of law, that a federal judge is clearly more than a moderator or an umpire. However, it is submitted that when a judge's participation in a trial reaches a point where it becomes clear to the jury that the court believes the defendant is guilty; error has been committed. This is true whether the judge's participation consists of "interrogating witnesses, addressing counsel, or some other conduct. . . ." *United States v. Nazzaro*, 472 F.2d 302 (2nd Cir. 1973).

In the *Nazzaro* case, *supra*, this court was constrained to reverse an importation of hashish conviction when the trial judge's conduct resulted in serious prejudice to the defendant. The conduct complained of therein was of the trial judge coming to "the aid of the prosecution witness during cross-examination . . . and . . . persistent questioning of defense witnesses, particularly the defendant . . ." The questioning by the court clearly demonstrated a disbelief in the defendant's testimony.

After a review of the record, this court reached the conclusion that the defendant had been denied a fair trial. The trial judge had crossed the fine line and had lost his appearance of impartiality. See also *United States v. Guglielmini*, 384 F.2d 602 (2nd Cir. 1967).

Our Supreme Court in *Quercia v. United States*, 289 U.S. 466, 53 Sup. Ct. 698, 77 L. Ed. 1321 (1933) had occasion to discuss the limitations placed upon a trial judge's comments during trial. In commenting upon testimony, the court may not assume the role of a witness. Although the court may analyze and dissect the evidence, it may not distort it or add to it. "Deductions and theories not warranted by the evidence should be studiously avoided." It is imperative that the court appear neutral since "his slightest word or intention is received with deference, and may prove controlling." See also, *United States v. Persico*, 305 F.2d 434 (2nd Cir. 1962) and *United States v. DeSisto*, 289 F.2d 833 (2nd Cir. 1961).

Another case worth mentioning is *United States v. Woods*, 252 F.2d 344 (2nd Cir. 1958). Woods was charged with violations of the Federal Narcotics Laws. In his appeal, he

complained of a comment made by the trial court to the jury. The court informed the jury that he personally believed that the defendant was guilty of the crime charged. This was held to be reversible error.

The comments of the trial court in the instant case, in light of the entire record, were unwarranted and prejudicial. Initially, the comment concerning the violations of the State Commercial Bribery Statute was unsupported by the evidence adduced at trial. The defendant was never charged with such a violation. The Government never provided evidence during the trial which would have supported such a violation. The court, from the first day of the trial, treated the instant case as if it were a typical bribery situation. The court never realized or wanted to realize the distinction between a simple bribery and the rather unique charge against the defendant in the instant case. (There is only one other reported case of a violation of Section 77q(b) of the Security Laws in the United States, *United States v. Amick*, 439 F.2d 351 (7th Cir. 1971).)

The instant case was never a bribery situation. The statute in question is not a bribery statute. It must be emphasized that the payment complained of by the Government is a legal payment if disclosure is made. Hence, the court's references to commercial bribery were nothing short of inflammatory prejudicial comments.[3] The only purpose of such a comment was to inform the jury that, in the court's opinion, the defendant was guilty of at least something; irrespective of whether the "something" the defendant was guilty of was charged or not.

3. The best indication of the court's apparent misunderstanding of the unique nature of the crime charged is found in a side bar conference during the defendant's case. See trial record.

Certainly no one can argue that the comments would not be highly prejudicial. Recalling the language of the *Quercia* decision cited, *supra*, the slightest word or intention of the court is received with deference and may prove controlling. This word of the court could only be received with deference and the jury was, at that time, put on notice that the court believed the defendant guilty. Further prejudice can certainly be inured from the court's statement that defense counsel was "misleading the jury." Certainly such a comment upon the alleged behavior of the defense counsel could seriously serve to weaken the defendant's credibility as well as that of his counsel; with the jury. Here the court has specifically accused a defense attorney of misleading the jury, effectively vitiating any future impact of the words of the defense counsel. Comments of this nature can only serve to deprive a defendant of a fair trial. It is submitted that this was the purpose of the comment and it is also submitted that this was its effect.

The court was not content to stop at this comment. The court was later in the trial requested to rule on an objection concerning a putative article regarding a company known as Casa Bella Imports. Rather than making a simple ruling of sustained or overruled in the presence of the jury, the court felt it necessary to again cross the fine line and make comments to damage the defendant's position and to insure the conviction of the defendant Zammas. The court's comments concerning Casa Bella Imports were unsupported by the testimony or, the physical evidence adduced at trial. The Government never attempted to introduce an article relating to Casa Bella Imports. The defendant Eric Aiken never testified to a nondisclosure in that article. His only testimony with regard to an article concerning Casa Bella Imports was that defendant Zammas

allegedly set up a deal where he was to have been paid by a party other than the defendant Zammas. There was nothing upon which an alleged nondisclosure could be inferred. In fact, what the court did, was to infer a breach of law based upon the court's determination that the law had been breached in the case at bar. In fact, the court said that if the jury desired, it could infer that Casa Bella was an illegal proposition based upon the fact that the instant case constituted an illegal proposition. Thus, the court's comment that the jury could make such an inference implied that the defendant was guilty of this and other uncharged crimes. The case law is replete with examples that say a court may properly comment upon the evidence, but there are no cases that say the court can properly comment on something that is not the evidence. Nothing that the court commented on with regard to the Casa Bella Import article is supported by any record.

In light of the entire record, the comments of the court warrant a new trial, to enable the defendant to receive a fair trial.

II.

The trial court erred in improperly instructing the jury as to the necessary elements of proof, and failed to give the properly requested legal instructions to the jury.

Defendant Zammas submits to this Court that the instructions given by the trial court in the instant case were unfair, misleading, inaccurate and denied him a fair trial. It is always incumbent upon the trial court to give a jury charge, which, when viewed in its entirety, fairly and accurately states

the applicable law. The jury charge should never be tantamount to directing the jury to bring in a guilty verdict. See *United States v. Dardi*, 330 F.2d 316 (2nd Cir. 1964). A jury charge, should, of course, never have the effect of confusing or misleading the jury. *United States v. Dillard*, 101 F.2d 829 (2nd Cir. 1938). Further, the charge should define what conduct or participation constituted a crime and this must be proved. *United States v. Gillian*, 288 F.2d 796 (2nd Cir. 1961).

It must be reemphasized here that the trial court may not direct a verdict of guilty no matter how conclusive the evidence. All the material issues of fact must be left to the jury for resolution. See *United Brotherhood of Carpenters and Jointers of America v. United States*, 330 U.S. 395, 67 Sup. Ct. 775 (1947) and *United States v. Murdock*, 290 U.S. 389, 54 Sup. Ct. 223 (1933).

The charges in the instant case will be examined in light of the above authorities. Defendant will first address himself to the Government's requested Jury Instruction No. 24, which, over strenuous objection, the court gave to the jury. This charge read as follows:

> "If you find that consideration has been promised for an article which will be circulated by mail, then you must determine whether the promise or amount of consideration has been made public or disclosed.
>
> If you find that the money was transferred secretly, that will be sufficient to satisfy the third element."

It is this charge that had the effect of directing a verdict as to an essential element; the question of intent. The court itself recognized, during the argument at the close of all of the evidence, that the cash payment was at least some proof of the intent of the defendant as to disclosure of the payment.[4] Clearly, the court could not instruct the jury that this, in and of itself, was sufficient to satisfy the element of nondisclosure; especially in light of the fact that the defense conceded the fact that the money itself was paid. The defense's position was simple. The payment itself was legal under federal law if disclosure of the payment was made. Whether the defendant Zammas, intended nondisclosure was an issue of fact that the Government had the burden of proving. It was argued on behalf of the defendant that the Government had failed to prove that nondisclosure was the intent of the defendant. The complained of instruction was an inaccurate and unfair statement of the applicable law. The court erred in giving this instruction. In effect, the instruction given by the court had the effect of directing the jury to bring back a verdict of guilty. Based upon the defense's position taken in this case, the question of intent not to disclose and the subsequent nondisclosure is a key issue. The defendant put on a defense in this matter which showed that even if Aiken had disclosed his interest to the publisher, this interest would not have been disclosed in the newspaper. This testimony, by Edward Crooker, Comptroller of the Value Line Investment Services, affirmed the existence of a "good faith" policy by Value Line indicating that only the interests of officers and directors would be disclosed in the newsletter. Mr. Crooker's testimony further established that any conflicts or interests of employees, such as Aiken, need only be disclosed to the corporate legal counsel who would take

4. This statement by the court occurred during a colloquy between defense counsel and the court.

internal steps to insure that no prejudice affected the interests of the subscribers of the service. It was the defendant's position that, based upon such testimony, an equally reasonable hypothesis could exist; that Aiken had disclosed his gratuity and his interest to either the publisher or the corporate legal counsel, and the Value Line Investment Survey determined of its own volition not to divulge said interest. If this be the case, the defendant Zammas would have clearly been exculpated under the terms of the statute. Therefore, the question of intent to not disclose was a key question before the jury. As such, the court's instruction in this matter relating to the method of payment was highly inappropriate. If the court had, in effect, said that you might find a secret payment evidence of an intent not to disclose, the jury would have been free to judge the facts by itself. The court's instruction clearly usurped the function of the jury and clearly denied the defendant a fair trial.

The trial court had agreed to give defendant's requested Jury Instruction No. 21. This request read as follows:

> "The Government must prove beyond a reasonable doubt that the defendants published or circulated the article describing Power Conversion stock in the September 29, 1972 issue of Value Line Selection and Opinion or that they aided and abetted the publication of said article. *You are instructed that a publisher is one who issues or causes to be issued printed matter for sale or circulation.*"

The defense relied upon the court's statement that this charge would be given. An integral portion of the defense was

the legal position that Aiken was not a publisher. Further, Aiken could not possibly have caused the article to be published, since, according to his own testimony, the final decision as to what was or was not to be published belonged to Arnold Bernhard himself. Arnold Bernhard had the absolute control as to what articles would be published in the selection and opinion. This was argued by the defense to the jury. This argument, inferentially, was based upon testimony again adduced at trial that Bernhard had the ultimate say on what was to be published and what was not to be published and that Aiken's position as editor was to merely prepare material for Bernhard's approval.

As part of their deliberations, the jury, in order to convict the defendant would necessarily have to find that Zammas "published or caused to be published" the article in question. The defense submitted that this, was in fact, impossible. Since the defendant Aiken could not publish nor cause the article to be published, defendant Zammas could not aid or abet him in so doing. The evidence established the only one who could publish or cause an article to be published would be Arnold Bernhard himself.

The requested instruction called to the attention of the jury the obligation of the Government to prove this crucial element. When the court was advised that it had failed to give the instruction, its only comment was to the effect that this issue was not really in dispute. The failure of the trial court to give the requested instruction constituted reversible error. As indicated elsewhere, the trial court had, during closing argument, indicated that "defense counsel was misleading" the jury. Here was another instance where defense counsel had relied upon what the court had indicated it would instruct the jury and

argued that the court would so instruct the jury. The court failed and refused to so instruct the jury causing the jury to believe again that defense counsel had misled them. Clearly this was error. Clearly this was prejudicial error. Clearly the defendant should be entitled to a new trial thereupon.

The trial court gave the Government's requested Jury Instruction No. 19 and rejected the defendant's requested Instruction No. 20. The Government's requested Instruction No. 19 was and is a misleading and inaccurate statement of the law. The third portion of the Government's requested Instruction No. 19 completely eliminated the element of intent. It must have been the intent of Zammas that there be a nondisclosure of the payment. A reading of the Government's charge shows that it fails to include this as part of the burden of the prosecution. This is most convenient because the Government failed to prove during the course of the trial, any intent on the part of the defendant Zammas.[5]

The defendant's Request No. 20 included the element lacking in Government's No. 19. The jury, instead of being given an accurate instruction as to the essential portions of this particular element of the crime, was given an incomplete statement as to what elements the Government was required to prove.

It is submitted by Zammas that the instructions, as a whole, were inaccurate and misleading. They failed to properly advise

5. It is interesting to note that the Government had in both a pre-trial memoranda relating to the testimony of Stanley Perlmutter and in its response to defendant's request for a bill of particulars indicated it would prove the intention of the defendant Zammas not to disclose by direct proof. It failed to do so.

the jury as to what proof was required by the Government. Further, they failed to give the jury the necessary guidance to enable them to reach an intelligent verdict.

It is respectfully submitted that the charges to the jury failed to give the defendant Zammas a fair trial and that the defendant Zammas is entitled to a new trial on the charges against him.

III.

The trial court erred in failing to grant defendant Zammas' motion for judgment of acquittal at the end of all of the evidence, when such motion should have been granted as a matter of law.

The Government failed to show that the defendant Zammas intended that payment for the article not be disclosed.

It was an essential element of the crime charged that the defendant intend nondisclosure of the payment of a gratuity to a financial newsletter for publication. Where a person makes a nondisclosed payment to another to publish an article describing a security, this creates a violation of 15 U.S.C. §77q(b). If that person does not intend to disclose said payment, it is the Government's burden to prove that intent through competent proof. At the trial in the instant case, the burden was upon the Government to prove beyond and to the exclusion of every reasonable doubt, that the appellant had the requisite intent to keep secret the fact that the article was paid for and that payment was to be undisclosed in that article. The payment of fifteen thousand dollars by the appellant to the defendant,

Aiken, was not illegal under 15 U.S.C. §77q(b) unless it was intended by the appellant that it was to be undisclosed. It is this wilful intent of nondisclosure that was not established by the evidence at trial.

It is submitted that the District Court erred in finding an inference from the evidence that the appellant wanted the payment to be nondisclosed. The test for the validity of an inference from circumstantial evidence in the Second Circuit is:

> ". . . always whether the Jury may rationally infer the ultimate fact to be proved from the basic facts, whether established by circumstantial or testimonial evidence in the surrounding circumstances of the crime." *United States v. Glasser,* 443 Fed. 2d 994 (2nd Cir. 1971).

In the case at bar the record is devoid of any competent evidence pointing to the appellant's intent to perpetrate a fraud by nondisclosure pursuant to the aforementioned statute. The appellant did not tell the defendant Aiken not to disclose that he was paid to write the article. As a matter of fact, the testimony adduced at trial was that the stock would go up on the rumor of an article, and would come down upon the actual publication, irrespective of disclosure or not. The only shred of evidence pointing to a possible circumstance showing intent was brought out at trial by the court. During the defense's closing the judge made a factual conclusion that the jury could infer that the payment agreement was, through a tacit understanding between appellant and defendant Aiken, that payment be nondisclosed. Besides being a highly prejudicial comment for the court to make in front of the jury, the inference of intent of

nondisclosure is not valid from the circumstantial evidence offered to prove same.

It was the position of the court that it could be reasonably inferred that defendant Zammas intended that the payment be nondisclosed because the payment was in cash. This cash payment and the alleged secret method of payment were the only circumstances which the judge relied upon to infer the element of intent not to disclose. It is respectfully submitted that the manner and method of payment do not reflect at all upon the intent of the defendant Zammas, but at best might tend to reflect on the intent of the defendant Aiken which was never disclosed to the defendant Zammas.

The record shows that the defendant Aiken requested cash from defendant Zammas because Aiken had had previous dealings with Zammas. These prior dealings caused him not to trust the defendant Zammas. Irrespective of what the nature of these dealings was, it is clear that the inference which the court may have drawn from the evidence does not find any support in the evidence itself. The only proffered inference which may be drawn from the payment of cash is that inference which was testified to by Aiken himself. In other words, he requested the cash because he felt a check might bounce and didn't trust an I.O.U. At no time did Aiken, or any other witnesses, testify that the cash payment was for the purpose of a secret payment to be nondisclosed to anyone else. (Clearly, payment in cash being the only mode of payment acceptable to the defendant Aiken does not show that defendant Zammas was ever interested in the question of disclosure of the payment. We call to the Court's attention that cash is legal tender and the use of cash in and of itself does not, outside other circumstances, give rise to a presumption of illegal intent.)

The question becomes whether the method of payment in conjunction with the manner of payment, could create the inference which the court sought to rely upon. The method of payment which the court describes as "secret" was never established by the evidence to be a secret payment or a secret meeting. The testimony is that on the day the payment was made, the defendant Aiken, informed the defendant Zammas that the article had been done. Further, that he would be glad to deliver to the defendant Zammas copies of the article in return for which payment was to be made. The defendant agreed to meet that night at a public restaurant in the City of New York whereby the exchange of proofs of the article for the payment would be made. It was testified that both defendants excused themselves from the table to transact their business. The testimony adduced at trial indicated that the purpose for this was not to transact business in front of the respective girlfriends. It is also clear from the trial record that Aiken himself made no effort to hide the payment, or what he was doing, from the woman who was at that time, his fiance. There was some testimony by the defendant Aiken that the meeting and exchange took place in the men's room of the restaurant. Apparently this was the desire of the defendant Aiken and not of the defendant Zammas. There is no evidence pointing to the defendant Zammas' alleged desire that the payment be nondisclosed. It is fundamentally unfair and incorrect for the court to have assumed that the defendant Zammas intended nondisclosure absent competent circumstantial evidence from which the jury could draw a reasonable inference. The Government indicated in both pretrial memoranda referred to elsewhere that it would prove the specific intent of nondisclosure. This it failed to do.

The Government failed to show that the appellant published the article in Value Line Selection and Opinion.

The trial court found that the appellant had a duty to disclose that the article had been paid for. This is fundamentally incorrect since the Government failed to prove that the appellant, or the defendant Aiken had published the article. The Government also failed to prove that the defendant Zammas or the defendant Aiken fraudulently gave publicity to a security through the article. Defendant Aiken's testimony showed that it was the Arnold Bernhard Company which published the Value Line Selection and Opinion. The defendant introduced into evidence a good faith disclaimer showing that Arnold Bernhard and Company's policy of not disclosing employee interests in stock in its Selection and Opinion magazine had been reviewed and approved by the Security and Exchange Commission. At best, Zammas paid the editor, Aiken, to write an article. There was no evidence from which an inference could be drawn that Zammas published the article, or caused it to be published, without disclosure of the payment.

Arnold Bernhard and Company, as publisher, failed to disclose the payment in the article. Bernhard and Company's public policy of "good faith" proves that, irrespective of Zammas' intentions, gratuities and interest of non-officers and directors would not be disclosed in Selection and Opinion.[6]

6. At trial, it was established that Aiken was neither an officer or director of Arnold Bernhard and Co. Inc. and that even if he had disclosed to the company his gratuity, the company would not publish the disclosure. In truth and in fact, as adduced at trial, when the eventual payment was given general publicity in the press at the time of the indictment of the defendants Aiken and Zammas, selection and opinion did not publish anything with regard to same.

Having accepted payment for the article, the duty to disclose fell upon the defendant Aiken. He should have informed Bernhard and Company pursuant to the company rules. There is no proof that he failed to do so; *i.e.*, (even though Bernhard and Co. is not responsible for the public's reliance on the articles printed in its publication, as per their good faith policy, the publisher itself is responsible for disclosing payment for articles published in its newsletter).

The appellant paid to have the article published for which he expressed no intent that the payment not be disclosed. Clearly, he did not violate the statute for he did not have, as a condition precedent to its publication, a condition that payment be nondisclosed. Clearly the duty is on the publisher to disclose. There is no evidence supporting the indictment charge that the appellant published the article or that he intended the article to be published for "an undisclosed payment." The above argument refers primarily to Counts 7-12 of the indictment. However, it is respectfully submitted that if Counts 7-12 fail to establish a crime by the defendant Zammas, Counts 1-6 must necessarily fail.

In order to violate the mail fraud statute, one must participate in a "scheme or artifice" to defraud (18 U.S.C. Section 1341). In the instant case, the scheme or artifice to defraud was charged as follows in the indictment:

> "(a) The defendants William Rodman and Thomas Zammas, who were dealing in the common stock of Power Conversion, Inc., and promoting the sale thereof, would and did secretly pay a fifteen thousand dollar bribe to

> defendant Eric Aiken in return for which the defendant, Eric Aiken agreed to write and publish an article in Value Line Selection and Opinion commending the purchase of Power Conversion stock without disclosing the material fact that the defendant Eric Aiken, had received and accepted a bribe."

As the anti-touting statute clearly indicates, such a gratuity, if disclosed, is proper and not fraudulent.

Hence, to take the position that the defendant Zammas could be guilty of mail fraud and not guilty of the anti-touting provision, would create an incongruity. This would, in effect, attempt to make illegal an act specifically made legal. In other words, if the anti-touting statute authorizes a gratuity under certain circumstances, then, if complied with, it could not possibly be a scheme and artifice to defraud as there could be no fraudulent intent to do a perfectly lawful act. The Government failed to come to grips with this point and the Court failed to understand its viability. However, when viewed in the proper perspective, it is clear that one cannot be convicted of doing an act which is lawful; nor can one be convicted of having an illegal scheme or artifice to defraud when one's "scheme and artifice" is a legal action recognized by statute. The Government failed as a matter of law to prove its case beyond the exclusion of a reasonable doubt. It is therefore suggested that the decision of the court be reversed.

CONCLUSION

For the above reasons, it is submitted that the writ of certiorari in this case should be issued and the Court should consider this case on the merits.

Respectfully submitted,

s/ Alvin E. Entin
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FRANKLIN, ULLMAN, KIMLER,
ENTIN & KATZ
Of Counsel

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of January, one thousand nine hundred and seventy-six.

Present:

HON. WILLIAM H. TIMBERS
HON. ELLSWORTH A. VAN GRAAFEILAND
HON. THOMAS J. MESKILL

Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v. 75-1360

THOMAS ZAMMAS,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

Appendix A — Opinion of the United States Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is *affirmed*. The mandate shall issue forthwith.

s/ William H. Timbers
William H. Timbers

s/ Ellsworth A. Van Graafeiland
Ellsworth A. Van Graafeiland

s/ Thomas J. Meskill
Thomas J. Meskill
Circuit Judges

In The

Supreme Court of the United States

October Term, 1975

No. 75-1236

THOMAS ZAMMAS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL APPENDIX

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ORDER DENYING PETITION FOR REHEARING EN BANC

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-sixth day of February, one thousand nine hundred and seventy-six.

United States of America,

Plaintiff-Appellee

v.

William Eric Aiken, William Rodman, Thomas Zammas,

Defendants,

Thomas Zammas,

Defendant-Appellant.

75-1360

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the appellant, Thomas Zammas, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Order Denying Petition for Rehearing En Banc

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

s/ Irving R. Kaufman
IRVING R. KAUFMAN, Chief Judge

ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-sixth day of February, one thousand nine hundred and seventy-six.

Present: HON. WILLIAM H. TIMBERS

HON. ELLSWORTH VAN GRAAFEILAND

HON. THOMAS J. MESKILL

Circuit Judges.

United States of America,

Plaintiff-Appellee,

v.

William Eric Aiken, William Rodman, Thomas Zammas,

Defendants,

Thomas Zammas,

Defendant-Appellant.

75-1360

Order Denying Petition for Rehearing

A petition for a rehearing having been filed herein by counsel for the appellant, Thomas Zammas

Upon consideration thereof, it is

Ordered that said petition be and hereby is Denied.

A. DANIEL FUSARO
Clerk

ORDER RECALLING MANDATE AND GRANTING STAY

75-1360
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UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixth day of February, one thousand nine hundred and seventy-six.

United States of America,

Plaintiff-Appellee,

v.

William Eric Aiken, William Rodman, Thomas Zammas,

Defendants,

Thomas Zammas,

Defendant-Appellant.

It is hereby ordered that the motion made herein by counsel for the appellant Thomas Zammas by notice of motion dated January 22, 1976 to recall the mandate and to stay its reissuance

and to continue bail pending application to the Supreme Court of the United States for a writ of certiorari pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure be and it hereby is granted.

It is further ordered that said stay shall not exceed a period of 30 days.

WILLIAM H. TIMBERS
ELLSWORTH A. VAN GRAAFEILAND
THOMAS J. MESKILL
Circuit Judges

No. 75-1236

In the Supreme Court of the United States

OCTOBER TERM, 1975

THOMAS ZAMMAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
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Washington, D.C. 20530.

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CITATIONS

In the Supreme Court of the United States

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THOMAS ZAMMAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. A) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 1976. A petition for rehearing was denied on February 26, 1976 (Pet. Supp. App. 3sa-4sa). The petition for a writ of certiorari was filed on March 1, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's conviction.

2. Whether the court properly instructed the jury regarding the elements of an offense under 15 U.S.C. 77q (b).

3. Whether certain comments by the trial judge deprived petitioner of a fair trial.

STATUTE INVOLVED

15 U.S.C. 77q(b) provides:

> It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of six counts of causing the use of the mails in furtherance of a scheme to defraud, in violation of 18 U.S.C. 1341 and 2, and of six counts of causing the use of the mails to publish an article describing a security without fully disclosing a bribe paid for the article, in violation of 15 U.S.C. 77q(b) and 18 U.S.C. 2.[1] He was sentenced to concurrent terms of 18 months' imprisonment on each count.

The evidence showed that in 1972 petitioner, a private securities dealer, was promoting a public sale of the common stock of Power Conversion, Inc. (A. 102a-103a, 214a, 218a, 475a-476a, 687a-690a, 842a-848a).[2] Through

[1]William Aiken pleaded guilty to one count of the indictment. William Rodman was acquitted on all counts.

[2]"A." refers to petitioner's appendix in the court of appeals.

an acquaintance, Stanley Perlmutter, petitioner asked William Aiken, executive editor of *Value Line Selection and Opinion* ("*Value Line*"), an investment advisory service, to publish an article in *Value Line* about Power Conversion in return for a payment from petitioner (A. 91a, 94a).[3] Aiken initially balked at doing business with petitioner, because petitioner had not paid Aiken the full agreed amount for an earlier article concerning Casa Bella Imports, Inc. (A. 97a, 199a, 211a-212a). When, however, Perlmutter assured Aiken that this time there would be guaranteed payment (A. 278a), Aiken agreed to meet with petitioner (A. 99a, 211a). Aiken eventually agreed to publish the article in return for $15,000 in cash and an option to purchase 20,000 shares of Power Conversion stock. Petitioner promised Aiken $1,000 cash in advance and 1,000 shares of stock to be held as security for payment of the remainder (A. 99a, 212a-217a).

Following the meeting at which this agreement was reached, petitioner and Aiken went to petitioner's apartment. There they met Henry Goldfarb, another broker whose firm was trading Power Conversion stock (A. 218a). Petitioner soon left the room and called Aiken into the kitchen, where, out of Goldfarb's presence, he gave Aiken $1,000 and three stock certificates representing 900 shares of Power Conversion stock (A. 218a-219a).

Some time later Aiken informed petitioner that the article was ready for publication, and they agreed to meet at a New York restaurant (A. 222a). Before the meeting Aiken told his fiancee that they were meeting petitioner to give him copies of the article and to receive the agreed payment (A. 456a-457a). In the men's room

[3]As executive editor, Aiken had virtually absolute control over the contents of the service, subject occasionally to Arnold Bernhard's desire to have a particular item published (A. 294a-297a).

of the restaurant petitioner gave Aiken $14,000 in cash and offered him an additional bribe of $25,000 to "park" 25,000 shares of Power Conversion stock (A. 224a-225a).[4] Aiken gave petitioner an envelope containing six copies of the issue of *Value Line* carrying the Power Conversion article.[5] The article contained no disclosure of the payment petitioner made to Aiken.

The prosecution introduced evidence that Aiken previously had published an article concerning Casa Bella Imports, Inc., in return for a promise of payment by petitioner. That article, too, had been published without disclosure of the promise (A. 97a, 199a, 211a-212a; Gov't Exh. 1A).

Petitioner called as a witness the Comptroller of Arnold Bernhard & Co., the corporate publisher of *Value Line*. On cross-examination he testified that the company represented itself to the public as a reliable investment advisory service, giving independent, objective evaluations of securities and that if Aiken had disclosed to the company that he had received a payment from petitioner, the article would never have been published, or, had it already been published, the company would have disclosed the facts to its subscribers (A. 1020a-1024a).

ARGUMENT

1. Petitioner contends (Pet. 27-33) that the prosecution's proof was deficient because it did not establish that he

---

[4]"Parking" stock, as defined by Aiken at trial, means getting a friendly portfolio or money manager to agree to buy stock, sometimes for a monetary consideration and sometimes with a guarantee against loss. It is a method of getting stock off the market (A. 224a-225a). "Parking" is a manipulative device in violation of 15 U.S.C. 78j(b).

[5]42,955 copies of this issue of *Value Line* were mailed to subscribers (Gov't Exh. 1E).

intended the payment to Aiken to go undisclosed to *Value Line*'s subscribers. But although there was no proof that petitioner specifically instructed Aiken not to disclose the payment, the conclusion that petitioner desired nondisclosure was virtually inescapable. The entire transaction between petitioner and Aiken was conducted in a clandestine manner. The final cash payment of $14,000 took place, at petitioner's suggestion, in the men's room of a restaurant. Similarly, the earlier $1,000 cash advance had occurred at petitioner's apartment only after he summoned Aiken into the kitchen, out of the presence of another broker. Moreover, the very fact that the payments of large sums of money were made in cash was evidence that petitioner desired to keep knowledge of the transaction from the public record. Cf. *Spies* v. *United States,* 317 U.S. 492, 499. Too, this was not the first such transaction between petitioner and Aiken; the article concerning Casa Bella Imports, Inc., also had been published without disclosure of the payment. And, finally, the jury could conclude that the very success of petitioner's scheme depended on non-disclosure of the payment for the article. Had the payment been revealed, the success of the article as a means of persuading people to buy Power Conversion stock (and hence of raising its price) would have been fatally impaired.

Petitioner also contends (Pet. 31-33) that the government failed to prove that he caused the article to be "published." It is true that Aiken was not the corporate "publisher" of *Value Line*. But Aiken testified (A. 294a-297a) that he had all but total editorial control of the publication, subject only to his employer's occasional desire to have a particular item published. Petitioner knew that Aiken was in a position virtually to ensure publication of the article. The only reason petitioner made the payment to Aiken was to have the article published. Petitioner brought about the publication of the article. That is enough. See *Pereira* v. *United States,* 347 U.S. 1, 8-9; *Nye & Nissen*

v. *United States*, 336 U.S. 613; *United States* v. *Peoni*, 100 F.2d 401, 402 (C.A. 2).

2. Petitioner challenges three elements of the trial court's instructions regarding 15 U.S.C. 77q(b). Petitioner does not question the correctness of the court's instructions relating to the mail fraud counts. He received concurrent sentences on each of the counts of which he was convicted. Accordingly, the Court need not consider his contentions in regard to the instructions. *Barnes* v. *United States*, 412 U.S. 837, 848, n. 16. In any event, this is only the second case to consider the elements of the offense under Section 77q(b).[6] There is no conflict among the circuits and no reason to grant the writ.

a. The court instructed the jury that (A. 1239a):

> [I]t is necessary for you to find that the Government has proved beyond a reasonable doubt each of the following four elements of that crime: First, that a person by use of the mails has published or circulated an article describing a security.
>
> Second, that consideration for such publication or circulation has been received or promised from a dealer.
>
> Third, that there has been no disclosure of the payment made or promised or the amount of such consideration.
>
> Fourth, that the article has been wilfully and knowingly circulated.

As to the third element, the court went on to state (A. 1241a-1242a; emphasis added):

> If you find that money or other consideration has been promised or paid for an article which will be circulated by mail, then you must determine whether the promise or amount of consideration has been made public or disclosed. *If you find that the money was transferred secretly, that will be sufficient to satisfy the third element.*

[6]The other case is *United States* v. *Amick*, 439 F.2d 351 (C.A. 7).

Petitioner contends (Pet. 22-23) that the underscored sentence had the effect of directing a verdict on the issue of his intent to seek publication of the article without his payment for its being disclosed. But this portion of the instruction did not relate to petitioner's intent or state of mind; it concerned only the issue of actual non-disclosure. The instruction informed the jury that if the transfer of the money was secret and remained so upon publication of the article, the element of non-disclosure would be satisfied. The court then turned to the fourth element of the offense and told the jury that it could convict petitioner only if it found that he acted "wilfully and knowingly," that is, deliberately and with a "bad purpose or motive" (A. 1232a, 1242a). Thus the issue whether petitioner had made the payment to Aiken with the specific purpose of avoiding its disclosure was placed squarely before the jury.

b. Petitioner argues (Pet. 24-26) that he was entitled to an instruction "that a publisher is one who issues or causes to be issued printed matter for sale or circulation." This instruction was necessary, he contends, because of his defense that "Aiken was not a publisher" and that he "could not possibly have caused the article to be published" since the final decision regarding publication lay with Aiken's employer. But 15 U.S.C. 77q(b) does not incorporate petitioner's mechanical notions of "ultimate" or "legal" power to determine what is published. The actual ability to publish or cause publication of an article is enough, for actual publication produces the deception of the public that the statute is designed to avert. Aiken's

authority as executive editor gave him virtually a free hand in determining what to publish in *Value Line;* that he may not have been the "publisher" of *Value Line* was immaterial, and the instruction requested by petitioner could only have misled the jury.

c. Petitioner's final claim regarding the instructions—that the court failed to require the jury to find that he intended non-disclosure of payment (Pet. 26-27)—already has been answered at pages 4-5, *supra.*

3. Petitioner contends that he was deprived of a fair trial because of two allegedly prejudicial comments by the trial judge. Both comments were, however, mandated under the circumstances.

a. During defense summation, counsel argued to the jury that "my client is on trial for making a payment which he had a perfect right to make under the Federal law provided said payment was disclosed" (A. 1140a-1141a). The government objected, and the court responded (A. 1141a):

> Yes, we went over that earlier [7] and it was determined that under State law if the jury finds it to be true, it is not a legal act. The question is whether or not you are implying to the jury that giving a payment under the circumstances here is legal.
>
> You said it was legal and we determined it was illegal under State law to give such a payment.

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[7]The court's reference is to the argument on petitioner's motion for judgment of acquittal. Petitioner had argued that payment to Aiken was a legal act, if disclosed. The government had rebutted that argument by pointing out that even if disclosed the payment might have violated the New York Commercial Bribery Statute, New York Penal Law § 180.00 (McKinney 1975). The court instructed defense counsel at that time that "it is incorrect to say to the jury something is legal which is made illegal by the state law, even though not made illegal by the federal statute" (A. 1060a).

> The Federal law makes it illegal to give such a payment if it is not disclosed. Don't mislead the jury by telling them it is a legal act if they find it did occur.

Petitioner argues (Pet. 19-20) that the court's reference to an act illegal under state law was inflammatory. But petitioner's antecedent remark clearly was capable of misleading the jury into believing that federal law affirmatively protected petitioner's conduct; in fact, if petitioner's conduct had not been made unlawful by federal law it still might have violated state law. No federal law gave petitioner a "perfect right" to make the payment despite any applicable state laws. Having opened up a subject that counsel had specifically been warned to avoid, petitioner cannot complain of the court's attempt to correct the mistaken impression the remark may have left with the jury.

b. During rebuttal the prosecutor referred to the prior undisclosed payment for the article relating to Casa Bella Imports. Defense counsel moved to strike the remark on the ground that there was no evidence that the payment in that case had not been disclosed (A. 1170a-1171a). The court commented (A. 1171a-1172a):

> I told the jury it is their recollection of the facts which control. The motion to strike is unnecessary.
>
> If they remember it differently, they remember it differently. I don't remember precisely what Mr. Aiken said, but it is the jury's recollection that controls and they might even infer that from all of his other testimony or the testimony relating to this, if they so desire. That was also an illegal proposition.
>
> There is evidence from which they could, if they believed the testimony of Aiken, infer that that was so in that case, so it is unnecessary to strike it.
>
> Proceed.

Petitioner contends that this comment conveyed to the jury the court's belief that "the law had been breached in the case at bar" and that from that fact it could "infer that Casa Bella was an illegal proposition" (Pet. 20-21).

The court's remark was proper. There was substantial evidence of record that the Casa Bella payment had not been disclosed.[8] The court did not say that it believed petitioner to have committed a criminal offense, either previously or in the instant transaction, but simply informed the jury that if it believed Aiken's testimony, it could find that the prior transaction was illegal. Furthermore, the court went on to charge the jury specifically that petitioner was not on trial for the Casa Bella transaction and that the evidence concerning the episode could be considered only "with respect to the question of whether [petitioner] acted knowingly and wilfully and intentionally" in the instant case (A. 1233a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[8]This was in the form of a statement made by Aiken in connection with his plea agreement (Gov't Exh. 1A); the statement was admitted in evidence and read to the jury.